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No. 04[illegible] 14 2005

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

THE STATE OF TEXAS,
PETITIONER,

V.

ALBERTO VALDEZ.
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE TEXAS COURT OF CRIMINAL APPEALS

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CAPITAL CASE

QUESTIONS PRESENTED

QUESTION I

Does the Eighth Amendment bar to executing a mentally retarded person, as established in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), apply retroactively to a death sentence imposed long before there was any "societal consensus" against executing the mentally retarded?

QUESTION II

Does the Eighth Amendment bar to executing a mentally retarded person, as established in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), require that the underlying death sentence itself be vacated and that the non-death consequences of the "death sentence" be removed, or merely that the execution itself be indefinitely or permanently stayed?

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PETITION FOR A WRIT OF CERTIORARI

The State of Texas respectfully petitions for a writ of certiorari to review the decision below.

ORDER BELOW

Pursuant to Findings of Fact and Conclusions of Law filed by the trial court on August 10, 2004, (Appendix A), the Texas Court of Criminal Appeals summarily granted a commutation of Alberto Valdez's death sentence on November 10, 2004. *Ex Parte Alberto Valdez*, No. AP75039, 2004 WL 2538847 (Tex. Crim. App., November 10, 2004) (not yet reported) (Appendix B).

JURISDICTION

The Texas Court of Criminal Appeals denied the State's motion for reconsideration in an unpublished order on January 12, 2005. (Appendix C). On that same date, the Texas Court of Criminal Appeals granted the State's motion to stay issuance of its mandate for a period of 90 days. (Appendix D). Thus, the State's petition for writ of certiorari is timely filed on or before April 12, 2005. SUP. CT. R. 13.3 (West 2002). This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

STATEMENT OF THE CASE

Alberto Valdez was tried for capital murder in 1988, for the 1987 shooting death of Corpus Christi Police Officer J.D. Bock. He was convicted and sentenced to death on May 16, 1988. On direct appeal, the Texas Court of Criminal Appeals affirmed the conviction. *See Valdez v. State*, 776 S.W.2d 162 (Tex. Crim. App. 1989).

Valdez's first state writ of habeas corpus was filed on June 28, 1990, and challenged, among other things, ineffective assistance of counsel based on claims that Valdez's trial attorneys should have investigated his alleged mental retardation and used that in mitigation at the punishment stage of trial. After an evidentiary hearing, the trial court made findings and conclusions against the claim of ineffective assistance, but, in view of the state of the law at that time, did not make a finding concerning mental retardation. The Texas Court of Criminal Appeals denied the first state writ on August 14, 1997.[1]

Valdez then filed his federal application for writ of habeas corpus, and the federal district court granted relief on September 28, 1999, *see Valdez v. Johnson*, 93 F.Supp.2d 769 (S.D. Tex. 1999), but was reversed by the Fifth Circuit on December 3, 2001. *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001), cert. denied, 123 S.Ct. 106 (2002).

On June 20, 2002, the United States Supreme Court handed down its opinion in *Atkins v. Virginia*, 536 U.S.

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[1] The long delay between filing of the writ and disposition was due to an oversight concerning the filing of findings and conclusions by the trial court.

304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), which essentially held that it is unconstitutional to execute anyone who is mentally retarded, as that term is commonly defined by the American Psychiatric Association and the American Association on Mental Retardation.

On June 19, 2003, Valdez filed his second state writ of habeas corpus, arguing that his mental retardation bars execution under *Atkins*. On July 2, 2003, the Texas Court of Criminal Appeals issued an order allowing the subsequent writ to proceed. The trial court then held a hearing at which Valdez presented evidence that he is mildly mentally retarded, with a full-scale IQ of 63 and associated adaptive-functioning deficits. The trial court made findings of fact supporting Valdez's claim that he is mildly mentally retarded. (Appendix A). The State filed a Supplemental Response arguing both that the *Atkins* bar to execution should not be applied retroactively and, alternately, that the proper remedy would be to stay execution rather than commute the death sentence to a life sentence. (Appendix E). However, on November 10, 2004, the Texas Court of Criminal Appeals granted relief, and ordered Valdez's death sentence commuted to a sentence of life in prison. (Appendix B).

The State filed a motion for reconsideration on November 16, 2004, which was denied by the Texas Court of Criminal Appeals on January 12, 2005. (Appendix C). On that same date, however, the Texas Court of Criminal Appeals granted the State a 90-day stay of the issuance of mandate in order for the State to bring the present petition for writ of certiorari in this Court. (Appendix D).

REASONS FOR GRANTING THE WRIT

Summary of the Argument

Because there was no "societal consensus" against executing a mentally retarded person at the time that Alberto Valdez was sentenced to death, his execution does not offend the Eighth Amendment, but rather carries out the societal consensus at the time of his trial and sentencing that persons with mental retardation should not be *per se* exempt from the death penalty.

Alternately, the Texas Court of Criminal Appeals misinterpreted this Court's opinion in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), to require that, upon a finding of mental retardation, the underlying death sentence itself be vacated and that the non-death consequences of the "death sentence" be removed, rather than merely that the execution itself be indefinitely or permanently stayed.

QUESTION I

Does the Eighth Amendment bar to executing a mentally retarded person, as established in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), apply retroactively to a death sentence imposed long before there was any "societal consensus" against executing the mentally retarded?

The *Atkins* opinion itself says nothing about retroactive application to a fifteen-year-old sentence handed down at a time when no national consensus had yet developed against condemning the mentally retarded to death.

A. The societal consensus doctrine.

In *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 1774, 95 L.Ed.2d 262 (1987), this Court recognized that "a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense." 107 S.Ct. at 1774; *see also Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 2608, 115 L.Ed.2d 720 (1991). In 1989, after Valdez had been convicted and sentenced to death, this Court concluded that no societal consensus existed at that time against executing the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 2955, 106 L.Ed.2d 256 (1989). Thirteen years later, the Court in *Atkins* found that such a consensus had developed, based largely on an examination of legislation from the various states prohibiting the execution of the mentally retarded. *Atkins*, 122 S.Ct. 2248-49

Interestingly, the same concept of a societal consensus was earlier applied by this Court in a narrower sense, as a justification for allowing the states to impose a death sentence as a necessary punishment, based on "respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction." *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976).

Accordingly, it appears that this concept of a societal "consensus" may cut both ways regarding Eighth Amendment restrictions: statewide consensus as evidenced by the legislature's own judgment concerning the death penalty must be respected and not barred by the Eighth Amendment; at least until enough states have enacted contrary legislation to evidence a broader national consensus going against that individual state judgment, in

which case the Eighth Amendment does bar the death penalty. Exactly when national consensus trumps an individual state's consensus is hard to say, but it seems at least worth considering that, until the pendulum swings in favor of an overriding national consensus, respect for the state's own consensus requires that its convictions and sentences should be allowed to stand.

B. Retroactive application.

A decision of the Supreme Court resulting in a new rule applies only in limited circumstances to convictions that are already final. One such circumstance is when the new rule prohibits a certain category of punishment for a class of defendants because of their status or offense. *See Beard v. Banks*, 124 S.Ct. 2504, 2513, 159 L.Ed.2d 494, 72 USLW 4578 (2004); *Schriro v. Summerlin*, 124 S.Ct. 2519, 2522, 159 L.Ed.2d 442, 72 USLW 4561 (2004); *Penry*, 109 S.Ct. at 2952-53; *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (plurality opinion).

However, the State could find no case where this Court has definitively applied that principle to a substantive right newly generated based on the "societal consensus" doctrine. Of course, where a right is based on pre-existing principles that have been re-examined, and the right newly applied to a particular situation or class, it makes sense to apply those pre-existing principles even to cases that pre-date their formal recognition as binding in some new way. However, when the right is based on a newly formed "societal consensus," it should not apply to sentences handed down prior to such a consensus, when the right simply did not exist at all.

When the Supreme Court interprets a constitutional prohibition in broader terms than before based solely on a

changing "societal consensus," it acts in what might be described as a quasi-legislative role—*i.e.*, normally the legislature, not the judiciary, changes the law based on concerns akin to societal consensus. Since substantive statutory law generally has only a prospective application, the same principles should apply when the Supreme Court re-interprets a constitutional prohibition based on its analysis of the changing societal consensus.

Even in this Court's opinion in *Penry*, where it suggested that a ruling protecting the mentally retarded from execution would be applied retroactively, that suggestion was merely dicta in view of the Court's conclusion that there was then no general consensus against executing the mentally retarded. 109 S.Ct. at 2953 & 2955.

In the present case, there was no societal consensus against executing a mentally retarded offender at the time Valdez was sentenced to death. *See Penry*, 109 S.Ct. at 2955. Respect for the law in effect at that time and society's own sense of justice as then understood requires that the jury's sentence be respected and not barred by a later change in public sentiment. *Atkins* should not be applied retroactively.

C. The independent importance of deciding the question of retroactive application.

Moreover, it is important for this Court to answer definitively, one way or the other, the question whether *Atkins* applies retroactively, in order to finally establish the one-year period within which applicants may claim the protections of *Atkins* by subsequent/successive writs of habeas corpus. *See* 28 U.S.C. § 2244(b)(2)(A) & (d)(1)(C). Until such time as this Court declares *Atkins* to be retroactively applicable, this issue at least arguably

renders the law unsettled and applicants may claim the benefits of that uncertainty in further delaying their filing of subsequent applications for writ based on a claim of mental retardation. Accordingly, even if this Court is inclined to find retroactive application, it is in the interest of the State of Texas, as well as the federal government and all states that currently impose the death penalty, generally to have the issue settled as soon as possible.

QUESTION II

Does the Eighth Amendment bar to executing a mentally retarded person, as established in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), require that the underlying death sentence itself be vacated and that the non-death consequences of the "death sentence" be removed, or merely that the execution itself be indefinitely or permanently stayed?

A. Atkins bars execution, but does not condemn the underlying sentence.

At least in the context of an inmate already sentenced to death, *Atkins* does not condemn the death sentence itself as having been improperly rendered in any manner, but merely prohibits the execution of an inmate who can prove his claim of mental retardation. It is thus a restriction upon the *execution* of the sentence and not the original *imposition* of sentence.

In *Atkins*, this Court tracked the language of its earlier opinion in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), in holding that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 122 S.Ct. at 2252 (quoting *Ford*, 477 U.S. at 405). In *Ford*, this Court had stated that "the Eighth Amendment prohibits a State from *carrying out* a sentence of death upon a prisoner who is insane," *Ford*, 477 U.S. at 409-10, 106 S.Ct. at 2602 (emphasis added), and in another portion of the opinion that "[t]he Eighth Amendment prohibits the State from *inflicting* the penalty of death upon a prisoner who is insane. Petitioner's allegation of insanity in his habeas corpus petition, if

proved, therefore, would *bar* his execution." *Ford*, 477 U.S. at 410, 106 S.Ct. at 2602 (emphasis added).

Also tracking *Ford*, this Court in *Atkins* left to the States "'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Atkins*, 122 S.Ct. at 2250 (quoting *Ford*, 477 U.S. at 416-17, 106 S.Ct. at 2605).

In implementing the requirements of *Ford* concerning a condemned inmate found incompetent to be executed, the statutory remedy in Texas is not to reform the sentence to life in prison, but merely to stay the execution. TEX. CODE CRIM. PROC. ANN. art. 46.05(k) (Vernon Supp. 2003).

Similar to incompetency to be executed, "mental retardation is not necessarily a lifelong disorder." AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS p. 44 (Text Revision, 4th ed. 2000) (DSM-IV). The possibility then exists, as expressed in the DSM-IV, that a mentally retarded individual might improve to the point that he would no longer be classified as mentally retarded. *See Id.*, p. 44 (4th ed.) ("Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of mental retardation.").

That being the case—*i.e.*, that mild mental retardation may be a transitory condition like incompetency—it seems only appropriate that it should not be a cause for vacating the underlying death sentence, but only a reason to stay the execution while the condition persists. In many cases, of course, as with incompetency,

the condition may in fact be permanent and the stay of execution will likewise, effectively, be permanent.

B. There is no statutory authority in Texas to reform a death sentence that was properly imposed.

The only provision in the Code of Criminal Procedure for the reformation of a death sentence to a life sentence requires either a finding of insufficient evidence to support the death sentence, or both a finding of error in the punishment stage and a request for such relief from the prosecuting attorney. *See* TEX. CODE CRIM. PROC. ANN. art. 44. 251 (Vernon Supp. 2003); *Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001). Consequently, it appears that the Texas Court of Criminal Appeals' commutation in the present case was based on its understanding of this Court's holding in *Atkins*, which in turn is based on Eighth Amendment considerations.

C. Aside from execution, a capital death sentence includes other consequences that a capital life sentence does not.

One adjudged guilty of a capital felony may be sentenced to either life imprisonment or a "death" sentence. TEX. PENAL CODE ANN. § 12.31(a) (Vernon 2003). Of course, the most obvious consequence of a death sentence is that it allows the State to cause the defendant's death by lethal injection. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon Supp. 2003).

However, a death sentence also effectively incorporates the punishment of life imprisonment without the possibility of parole, as follows: Upon conviction, a person under death sentence is immediately transferred to the Texas Department of Criminal Justice –Institutional Division. TEX. CODE CRIM. PROC. ANN. art. 42.09, §§ 1

& 3 (Vernon Supp. 2003). Absent judicial action or executive clemency, he remains imprisoned there until either natural death or lethal injection, since "[a]n inmate under sentence of death is not eligible for release on parole." TEX. GOV'T CODE ANN. § 508.145(a) (Vernon Supp. 2004).[2] This aspect of the punishment imposed under a death sentence, moreover, distinguishes it from a life sentence for capital murder, which presently does allow for the possibility of parole after forty calendar years, *see* TEX. GOV'T CODE ANN. § 508.145(b) (Vernon Supp. 2004), and which, considering that Valdez committed his capital murder in 1987, would allow him to be eligible for parole in fifteen calendar years. *See* TEX. CODE CRIM. PROC. art. 42.18, § 8(b), *Acts of the 70th Legislature, Regular Session*, 1987, Ch. 384, § 5 & Ch. 11.01, § 7.

In addition to these tangible consequences, a "death sentence" also includes the stigma of being singled out by a jury as deserving of the highest form of condemnation known to our criminal law. Although death by lethal injection may never be carried out because of the defendant's disability, this does not detract from the jury's findings that he deserves that stigma, which the defendant should be required to bear in the form of an unexecutable "death sentence."

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[2] The law in effect at the time Valdez committed capital murder likewise denied parole to an inmate under a death sentence. *See* TEX. CODE CRIM. PROC. art. 42.18, § 8(b), *Acts of the 70th Legislature, Regular Session*, 1987, Ch. 384, § 5 & Ch. 11.01, § 7.

D. Federal question jurisdiction.

Nothing in the Eighth Amendment or the *Atkins* opinion required the Texas Court of Criminal Appeals to vacate or commute Valdez's death sentence. Yet, from the Texas Court or Criminal Appeals' summary disposition of Valdez's *Atkins* claim, it is abundantly clear that the Court commuted his sentence based on its understanding of the requirements of *Atkins*. This is especially clear in view of that fact that (1) there was no independent statutory authority for the Texas Court of Criminal Appeals to commute Valdez's sentence under these circumstances and the only claim that Valdez raised was an Eighth Amendment *Atkins* challenge to his sentence, and (2) the Texas Court of Criminal Appeals summarily vacated the sentence in a one-paragraph *per curiam* opinion, without any reasoned discussion of its alternatives under State law or prior State precedent to that effect, as if this were the only alternative available to it under the *Atkins* opinion. The Texas Court of Criminal Appeals clearly erred in its interpretation of the requirements of *Atkins* and the Eighth Amendment.

This Court's federal question jurisdiction is invoked when it is obvious from the state court's opinion that it "felt compelled by what it understood to be federal constitutional considerations" to rule in the manner that it did. *Michigan v. Long*, 463 U.S. 1032, 1039 n.4 & 1044, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S.Ct. 1391, 1395, 59 L.Ed.2d 660 (1979) (quoting *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568, 97 S.Ct. 2849, 2854, 53 L.Ed.2d 965 (1977)). This Court has also recognized that dismissal for lack of a federal question is inappropriate "'where there is strong indication ... that the federal constitution as judicially construed controlled the

decision below.'" *Long*, 463 U.S. at 1040 (quoting *State of Minnesota v. National Tea Co.*, 309 U.S. 551, 556, 60 S.Ct. 676, 679, 84 L.Ed. 920 (1940)).

As recognized in *Long*, this strong indication may be established by the silence of the underlying opinion concerning any alternate state law ground, as follows:

> Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Long, 463 U.S. 1040-41.

Finally, this Court has noted as "'important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action.'" *Long*, 463 U.S. at 1041 (quoting *National Tea Co.*, 309 U.S. at 557).

In the present case, the Texas Court of Criminal Appeals' one-paragraph opinion of November 10, 2004, stated simply that the record supports the trial court's findings (*i.e.*, that Valdez is mentally retarded) and, without citing any legal authority for its disposition, stated the remedy as follows: "Accordingly, we grant relief. We reform applicant's sentence to life imprisonment in the Texas Department of Criminal Justice Correctional Institutions Division."

There is no statutory mechanism in Texas for a condemned inmate who proves that he is mentally retarded, and thus not subject to execution under *Atkins*, to be commuted to a life sentence. Nor has the Texas Court

of Criminal Appeals in its present opinion, or any other opinion, stated its intention to judicially create a state-law remedy that provides for commutation of a death sentence when an *Atkins* bar arises.

It would, moreover, be unreasonable to assume that the Texas Court of Criminal Appeals, believing that it had more than one such option under an *Atkins*, chose as a matter of state law the most complete remedy of commutation of the sentence, without citing any authority or state-law rationale for that choice.

Obviously, the Texas Court of Criminal Appeals felt compelled by *Atkins* and its interpretation of the Eighth Amendment to commute or reform Valdez's sentence to life in prison, raising before this Court the question of whether federal law requires commutation of the death sentence or merely bars the execution of the "death-sentenced" offender. *See* 28 U.S.C. § 1257(a).

PRAYER FOR RELIEF

The State of Texas respectfully prays that this Court grant a writ of certiorari to the Texas Court of Criminal Appeals, allow the State to present the arguments addressed herein, vacate the order of the Texas Court of Criminal Appeals granting Valdez relief on his State writ, and grant such relief as the State shows itself to be justly entitled.

Respectfully submitted,

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APPENDIX A

No. 87-CR-1459-B

Ex Parte ALBERTO VALDEZ, *Petitioner.*	§	DISTRICT COURT
	§	NUECES COUNTY
	§	117TH DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On July 2, 2003, the Texas Court of Criminal Appeals remanded the above cause to this Court for consideration of the claim presented by Applicant Alberto Valdez ("Valdez") in his Second Petition for Writ of Habeas Corpus. The claim Valdez presented in his Second Petition for Writ of Habeas Corpus is whether he is mentally retarded and thus is entitled to habeas relief under Atkins v. Virginia, 536 U.S. 304, 153 L.Ed.2d 335 (2002). Atkins holds that the execution of mentally retarded defendants violates the Eighth Amendment to the United States Constitution. By agreement of the parties, the Court scheduled an evidentiary hearing for June 9-11, 2004 for the sole purpose of determining whether Valdez is a mentally retarded individual.

On June 9, 2004, Valdez appeared in person and through his counsel of record, and the State of Texas appeared through the Nueces County District Attorney's office. Valdez presented testimony from Dr. Gary Mears (the State's expert psychologist, who Valdez called as an adverse witness), Dr. Gilda Kessner (an expert psychologist), Olga Quintanilla (Valdez's sister), Dr. Richard Garnett (an expert psychologist), David Valdez (Valdez's brother), Cynthia Martinez (Valdez's niece), and Dr. J. Randall Price (an expert neuropsychologist). The

State presented testimony from Johnny A. Thompson (a correctional officer at the Polunsky Unit of the, Texas Department of Criminal Justice ("TDCJ")), David Torres (a commander with the Nueces County Police Department), Juan J. Carrizales (a translator employed by Nueces County), Carl E. Lewis (Valdez's defense counsel at his capital murder trial), Karen S. Barnes (a handwriting analyst employed Nueces County), and Dr. Gary Mears.

During his direct examination in the State's case-in-chief, Dr. Mears testified that he was changing his earlier opinion and was now agreeing with Valdez's expert psychologists that Valdez is in fact mentally retarded. (4 RR 171-75) The State rested following Dr. Mears's testimony, and the Court thereupon announced that it was finding that Valdez is mentally retarded, and was recommending that his Second Petition for Writ of Habeas Corpus be granted and his sentence of death be commuted to life in prison. (4 RR 175-76) The State stated on the record that, in light of the evidence that had been presented during the three-day evidentiary hearing, it would not oppose the Court's findings of fact and conclusions of law. (4 RR 177-78) The State subsequently submitted a proposed finding that "Alberto Valdez falls within the range of mild mental retardation as that term is defined by the American Psychiatric Association and the American Association on Mental Retardation."

The Court now renders its specific findings of fact and conclusions of law.

PROCEDURAL HISTORY

Valdez was convicted of capital murder and sentenced to death on May 16, 1988. After the Texas Court of Criminal Appeals affirmed Valdez's conviction on direct appeal, see Valdez v. State, 776 S.W.2d 162 (Tex. Crim. App. 1989), Valdez filed a Petition for Writ of Habeas Corpus in the 117th Judicial District Court of

Nueces County, Texas and in the Texas Court of Criminal Appeals on June 28, 1990. Valdez's petition alleged 24 separate claims for relief, including the claim that "[i]t is cruel and unusual punishment, in violation of the Eighth and Fourteenth Amendments, to execute mentally retarded persons like Valdez." (See Petition at Count XXIII, pp. 142-44)

In November 1990, the state court conducted an evidentiary hearing on Valdez's claim of ineffective assistance of counsel. The hearing also involved extensive testimony concerning Valdez's mental retardation. Nearly seven years later, in March 1997, the court denied Valdez's petition. With respect to Valdez's Count XXIII, the court concluded, "without deciding the issue of Valdez's mental retardation, if any, ... the execution of mentally retarded individuals does not per se violate the Eighth and Fourteenth Amendments." The Texas Court of Criminal Appeals denied relief in a one page order.

On January 30, 1998, Valdez timely filed an Application for Writ of Habeas Corpus in the United States District Court for the Southern District of Texas, Corpus Christi Division. Valdez raised 20 grounds for relief, including the claim that executing mentally retarded individuals is unconstitutional. After conducting an evidentiary hearing on Valdez's ineffective assistance claim, the federal district court (the Honorable Janis Graham Jack) granted habeas relief on Valdez's claim that his trial counsel rendered constitutionally inadequate representation in the punishment phase of the trial. See Valdez v. Johnson, 93 F. Supp. 2d 769 (S.D. Tex. 1999). Among other reasons for its conclusion, the district court specifically noted that the jury "was never provided the ... available evidence . . . that Valdez is mentally retarded." Id. at 771. On December 3, 2001, the U. S. Court of Appeals for the Fifth Circuit vacated the district court's

order and remanded the case for an assessment of Valdez's claims under the standards set forth in the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). See Valdez v. Cockrell, 274 F.3d 941 (5th Cir. 2001), cert, denied, 123 S. Ct. 106 (2002). The Fifth Circuit did not express an opinion regarding whether Valdez is mentally retarded.

During the pendency of the appeal from the district court's judgment granting relief, the U.S. Supreme Court decided Atkins v. Virginia, 536 U.S. 304, 153 L.Ed.2d 335 (2002), which held that the execution of mentally retarded defendants violates the Eighth Amendment to the U.S. Constitution. Rather than adjudicate Valdez's mental retardation claim, the district court, on June 5, 2003, dismissed without prejudice Valdez's pending Application for Writ of Habeas Corpus to accord the State of Texas "the first opportunity to determine whether Valdez's degree of retardation places him in the class of individuals protected from execution by the Constitution." (Order of June 5, 2003 at p. 3) The district court also observed that "[w]hile Valdez already presented a mental-retardation claim in state court, the state habeas court could not consider the claim in light of the constitutional principles outlined in Atkins. As the Supreme Court handed down its Atkins decision well after Valdez's state proceedings became final, the Texas State Court should presumably consider a new habeas action raising Valdez's mental-retardation claim." (Id.) This action by the federal district court appears to have been required by Fifth Circuit precedent, holding that "inferior federal courts have no useful role to play" in adjudicating claims of mental retardation until state courts have been "given the first opportunity to apply the Supreme Court's holding. ..." Bell v. Cockrell, 310 F.3d 330, 332-33 (5th Cir. 2002).

As the federal district court anticipated, the Texas Court of Criminal Appeals did grant Valdez an

opportunity to adjudicate his mental retardation claim by remanding his Second Petition for Writ of Habeas Corpus to this Court on July 2, 2003. The order signed by the Texas Court of Criminal Appeals provided that:

> In the instant cause, applicant presents a single allegation. We have reviewed the application and find that it satisfies the requirements of Art. 11.071, Sec. 5(a) V.A.C.C.P. Accordingly, the cause is remanded to the trial court for consideration of the claim presented by applicant.

The purpose of this Court's evidentiary hearing June 9-11, 2004 was to determine if Valdez is mentally retarded and thus cannot be put to death by the State of Texas. Having announced its ruling favoring Valdez at the conclusion of the evidentiary hearing, the Court now makes the following findings of fact and conclusions of law on the issue of mental retardation.

FINDINGS OF FACT

I. Valdez's Childhood And Teenage Years

1. Alberto Valdez was born on August 29, 1955 near Corpus Christi to Ignacio and Guadalupe Valdez. (Pet. Exhibit 1; 3 RR 74, 80) He was the fourth of eight children. (3 RR 76-77) Olga Quintanilla, the oldest sibling, recalled that Valdez was born at home with the assistance of a midwife. (3 RR 80) She remembered that her grandmother then came outside and reported that the baby had died. (3 RR 81) Her father also said that the baby was wrapped in a blanket and was not breathing. (Id.) But after the ambulance came and took him to the hospital, Olga's grandmother reported that the baby had started breathing again. (Id.)

2. Valdez had a turbulent childhood marked by neglect, deprivation, and abuse. Olga Quintanilla recalled that when Valdez was only two years old, his father would get him drunk on beer so that the father and his friends

could amuse themselves watching Valdez dance on top of a bar. (3 RR 84-85; see also 3 RR 279) Later in his childhood, Valdez was frequently subjected to wanton beatings by his alcoholic father. (3 RR 75, 83-84, 239) Valdez's father would start the beatings by striking Valdez on the head, and would use his fists, steel-toed boots, sticks, belts, and garden hoses. (3 RR 239-40, 253)

3. Although the Valdez family spoke Spanish in the home, the children began speaking English after Olga began school in the Corpus Christi Public Schools. (2 RR 109; 3 RR 279, 305) Consequently, Valdez was able to speak English when he began school in approximately 1961. (Id.)

4. At school, Valdez was never capable of doing the work and failed consistently. (3 RR 86-87; Pet. Exhibits 1,4) He started abusing alcohol when he was six or seven years old and began using tobacco at about the same age. (Pet. Exhibits 2, 3; 3 RR 280) At around age 12, he began to use illegal substances such as marijuana, amphetamines, and barbiturates. (Id.) He also inhaled volatile substances, including glue, spray paint, and gasoline. (Id.; 3 RR 279-80)

5. In November 1971, when Valdez was 16 years old, a Nueces County probation counselor named Debra Mayer wrote a detailed report recommending to a juvenile judge that Valdez be committed to the Texas Youth Council. (Pet. Exhibit 4) In her extremely detailed report, Ms. Mayer reported, among other observations, that:

- Valdez "is presently functioning within the lower dull normal range of intelligence, having an overall intelligence quotient of 64. Because of this and other factors, Albert has had a difficult time functioning in a school environment. Albert needed to be in special education, but refused to enter this program and therefore, was placed in the regular

classroom where he could not satisfactorily complete the work."

- Valdez was expelled from school in May 1971.
- Valdez's older brother, Ignacio, is mentally retarded and attended school hi special education until he dropped out.
- Valdez had assisted his father in carpentry work, "but he has discontinued working with his father and no longer contributes to their income."
- "When Albert was attending school he was given a group IQ test and was found to be functioning within the lower dull normal range of intelligence having an overall intelligence quotient of 64. He has had difficulty comprehending the work given to him in a normal classroom setting and this has created some aggressive behavior patterns in him."
- "Due to the fact that Albert has been out of school and does not attend church on a regular basis he is not incorporated into any group organizations. He does occasionally play football with some neighborhood friends but has been keeping company with boys older than him. Albert's position with these peers is one of subordination and it seems that these older boys have been manipulating him into doing their dirty work in connection with the burglaries."
- Valdez had married a 15 year old girlfriend in November 1971 "only to separate the same week. It seems that Albert has an inability to form a cohesive relationship with his male friends or females."
- Valdez "has been employed in various restaurants and grocery stores washing dishes and working as a checkout boy. He has displayed some hostility toward his employers and his last job because of conflicts with them or not receiving

enough pay." He does not "have any real goals set out as he is not future oriented and seems to have an inability to create a realistic structure for himself."

- "He is in a low mentality range and seems to be easily manipulated by his peer group. He is emotionally unstable and has an inability to form relationships with other people." "Albert is strongly influenced by his peer group and feels that this delinquent behavior is a method of gaining their acceptance. Albert can distinguish the difference between right and wrong but is manipulated by older boys into breaking the law."

(Id.) Based on Ms. Mayer's recommendation, Valdez was committed to the Texas Youth Council in approximately January 1972. (Id.)

II. Psychological Testing During Valdez's Developmental Period

6. On October 21, 1968, when Valdez was 13 years old and entering the sixth grade, he was administered the Wechsler Intelligence Scale for Children ("WISC") by Kathryn Henderson, a psychometrist employed by the Corpus Christi Public Schools. (Pet. Exhibit 1) On the WISC, Valdez received a full scale IQ of 63 (based on a verbal IQ of 60 and a performance IQ of 74). (Id.) Valdez was also administered a Peabody Picture Vocabulary Test on which he scored a 60. (Id.) Ms. Henderson reported that the "low score on the Peabody Picture Vocabulary Test substantiates the low score on the Vocabulary Subtest of the WISC." (Id.) Given these scores, Ms. Henderson concluded that "Albert is functioning within the EMR [educable mentally retarded] range of intelligence in comparison to the other children his age" and "is probably socially and educationally handicapped." (Id.) Accordingly, she recommended that Valdez be placed in "an EMR [educable mentally retarded]

unit." (Id.) Although Valdez apparently was so enrolled, his special education yielded little improvement, as Valdez failed every one of his sixth grade classes except for physical education. (Id.) By 1971, he had dropped out of school for good. (Id.; Pet. Exhibits 4,6)

7. The Court finds that the Corpus Christi Public School's testing on Valdez was reliable and that the results obtained from the WISC were accurate measurements of his intellectual and academic functioning. In the report, Ms. Henderson observed that "Albert was very cooperative, quiet-spoken and well-mannered during the testing situation. He appeared to be interested in all phases of the test." (Pet. Exhibit 1) There is no persuasive evidence that the IQ scores Valdez obtained on the WISC were understated or otherwise failed to accurately assess Valdez's intelligence as a result of any English-speaking difficulties, lack of formal education, substance abuse, depression, malingering, or lack of motivation during the testing process.

8. In July 1974, while facing a charge of auto theft in Hockley County, Texas, the 18-year old Valdez underwent another round of psychological testing. (Pet. Exhibits 2, 3) Valdez's court-appointed attorney had recognized that Valdez may suffer from a mental deficiency of some sort, and he therefore obtained a court-ordered psychiatric evaluation at the Big Spring State Hospital. (Pet. Exhibit 11) The State's psychologist, Dr. Ron L. Cohorn, administered the Wechsler Adult Intelligence Scale ("WAIS"). (Pet. Exhibits 2, 3) Consistent with the intelligence test administered six years earlier by the Corpus Christi Public Schools, the test administered by Dr. Cohorn showed that Valdez had a full scale IQ of 63 (based upon a verbal IQ of 64 and a performance IQ of 65). (Id.) Dr. Cohorn noted that Valdez's "fund of information" was poor, citing Valdez's inability to state the

number of months in a year and to describe a thermometer. (Id.) The doctor also opined that "Valdez's judgment is unpaired," that "his social skills are poor," and that his "chief defense is denial." (Id.) The staff diagnosis by the Big Spring State Hospital based on this testing was that Valdez suffered from mental retardation. (Id.; 3 RR 308)

9. The Court finds that the WAIS test performed by Dr. Cohorn was reliable and that the results obtained were accurate measurements of his intellectual and academic functioning. There was no persuasive evidence that the IQ scores Valdez obtained on the WAIS were understated or otherwise failed to accurately assess Valdez's intelligence as a result of any English-speaking difficulties, lack of formal education, substance abuse, depression, malingering, or lack of motivation during the testing process.

III. Valdez's Adulthood

10. As Valdez entered his adult years, he never lived alone or maintained his own place of residence. (3 RR 91-92, 248, 259, 265) Valdez's family members testified that, when he was not in prison, he would live either with the family members or with a series of girlfriends in their residences. (3 RR 92, 248, 259, 265) His relationships with these girlfriends tended to be brief, and for the most part they involved older women who were introduced to him by his sister, Olga. (3 RR 93, 248-49)

11. When he was not in prison, Valdez was never able to hold a regular job. (3 RR 91, 165-66, 246, 264) He tended to perform only menial work, including temporary work on construction sites. (Id.) He also made money by stealing or assisting others as a drug courier. (3 RR 94, 191) Family members testified that he was not able to budget money, and that he tended to act impulsively and without planning. (3 RR 91, 247, 249, 265-66)

12. Valdez's criminal convictions reflected the

activities of a hapless thief rather than a violent criminal. (3 RR 176-77) For example, in connection with the auto theft charge that resulted in the Big Spring Hospital testing, Valdez explained to the examiners that he had consumed more than six quarts of beer and a bottle of vodka, and that he awoke in an automobile and was arrested because it was said that the automobile had been stolen. (Pet. Exhibits 2, 3; 3 RR 177-78)

13. The circumstances surrounding Valdez's convictions for check forgery hi 1978 and 1981 similarly reflect the activities of a non-violent, incompetent thief. (3 RR 179-82) The 1978 conviction indicates that Valdez and another individual found a checkbook with three checks in it lying on a street in Bryan, Texas. (Pet. Exhibit 12; 3 RR 180) They messed up the first check because they could not spell the name right and they tore up the third check. (Id.) On the second check, they wrote Valdez's own name in the payee blank, signed the check in the name of the checkholder, and then presented the check for cashing in a grocery store. (Id.) This virtually assured that Valdez, rather than the other individual, would be caught. (Id.)

14. In 1981, Valdez was convicted of another check forgery. (Pet. Exhibit 13) In that instance, he accompanied his wife, Bertha, to a convenience store where she presented a check purportedly signed by the owner of the check for "house repairs." (Id.; 3 RR 181-82) The cashier cashed the check because he knew Bertha but not Valdez. (Id.) Because Valdez was together with Bertha when the check was cashed, he was arrested and convicted. (Id.)

15. The circumstances surrounding Valdez's conviction for burglary of a habitation in 1983 reflect similar incompetence. (Pet. Exhibit 14; 3 RR 183-84) In that instance, Valdez gained entry to a residence using tools that he found at the scene. (Id.) Because Valdez had rung the doorbell of a neighbor's house immediately

before entering the other residence, the neighbor was able to alert the homeowner of Valdez's entry. (Id.) The homeowner alerted the police, who arrested Valdez as he ran from the house. (Id.) Later, the homeowner was not able to find anything missing from the house. (Id.)

16. During his various periods of incarceration in the Texas Department of Corrections and the Federal Correctional Institution, Valdez's history of work and academic performance was undistinguished. (3 RR 156-61, 167-69) Valdez maintained a series of mundane job assignments, including basic work in carpentry and cooking. (Pet. Exhibit 8; 3 RR 167-69) He was not able to become certified in either drafting or commercial cooking. (Id.) In 1985 to 1986, Valdez took the General Education Development Test ("GED") three times. (Pet. Exhibits 8, 19) Passing the GED requires approximately a seventh or eighth grade level of academic functioning. (2 RR 146; 3 RR 158) On all three occasions, Valdez failed the GED. (Pet. Exhibits 8, 19; 3 RR 157-61)

17. In August 1985, while he was in prison, Valdez was also administered the California Test of Adult Basic Education Level. (Pet. Exhibit 8) His overall score on that test was a 59, which was consistent with his scores on the WISC in 1968 and the WAIS in 1974. (Id.)

IV. The Capital Offense and the Trial

18. On September 9, 1987, Sgt. Joseph D. Bock of the Corpus Christi Police Department was issuing a traffic citation when a car driven by Valdez passed him at a high rate of speed. Valdez, 776 S.W.2d at 164. Officer Bock chased Valdez at a high rate of speed until, on a remote country road, Valdez's car blew a tire. (Id.) A witness who followed the chase testified that when he arrived at the scene, he saw Officer Bock and Valdez wrestling, heard a gun discharge, and saw Officer Bock bend over and fall down. (Id.) Valdez testified that the shots were fired at

Officer Bock by a passenger in his car, a casual acquaintance known to Valdez only as "Chico." Id. at 165.

19. After Officer Bock had been shot, Valdez returned to his own disabled car and drove away. Id. at 164. Another police officer saw Valdez enter a small farmhouse, and Valdez was later found in a field a considerable distance behind the house. Id. Ballistics reports indicated that Officer Bock had been fatally wounded by bullets from his own service revolver, which the police found underneath the cushions of a sofa in the farmhouse. Id. The owner of the farmhouse, who spoke briefly with Valdez, was unharmed. Id. As United States District Judge Janis Jack observed, this tragic act of violence was not the result of advance planning and calculation but rather "appears to have been conceived and completed within a matter of seconds, immediately following the high-speed car chase and a struggle with Bock." Valdez v. Johnson, 93 F. Supp. 2d at 787.

20. Valdez was indicted on September 10, 1987, and his case was assigned to the Honorable Robert Blackmon of the 117th Judicial District Court in Nueces County, Texas. The court appointed Carl Lewis and David Gutierrez to represent Valdez. United States District Judge Jack subsequently found that Lewis and Gutierrez rendered constitutionally inadequate assistance of counsel to Valdez by failing to investigate Valdez's background and his mental condition. See Valdez v. Johnson, 93 F. Supp. 2d at 774, 778-82, 786. As a result of their inadequate investigation, counsel did not obtain Valdez's school records or the Big Spring evaluation (which was included in the pleadings regarding his 1974 Hockley County conviction). Id. Thus, they did not present to the jury any evidence indicating that Valdez is mentally retarded. Id.

21. In the guilt-innocence phase of the trial, Valdez

insisted on telling the jury an alibi defense that both Lewis and Gutierrez found to be illogical and unbelievable. (4 RR 106-08, 125) Specifically, Valdez insisted on telling the jury that a man he knew only as "Chico" was riding with him on the day in question. (XII Tr. 734) As Officer Bock was arresting Valdez, Chico shot Bock with Chico's own pistol; Valdez then drove off in his own car, leaving Chico behind. (XII Tr. 756-57, 760) Lewis testified that this alibi was met by the jury and courtroom crowd with eye-rolling, snickering, and disbelief. (4 RR 125) In a bench conference, the experienced trial judge told the attorneys that "never in my career have I heard anything like this before. Did you discuss this business with him?" (XII Tr. 177) According to Lewis, Valdez's demeanor created an impression before the jury that he lacked remorse for the fact that an officer had been killed. (4 RR 125-26)

22. After Valdez was convicted and sentenced to death, he was transported to the Ellis I Unit and was administered a mental health examination. (Pet. Exhibits 18, 19) The notes from that mental health evaluation indicate that there was "not enough evidence to R/O [rule out] mental retardation." (Pet. Exhibit 18)

V. The Expert Psychologists

23. Dr. Gilda Kessner is a clinical psychologist from Dallas, Texas. (2 RR 269; Pet. Exhibit 38) On June 1, 2004, shortly before the evidentiary hearing in this Court, Dr. Kessner personally administered to Valdez the following tests: the Mini Mental Status Examination ("MMSE"), the Kaufman Functional Academic Skills Test ("K-FAST"), the Wide Range Achievement Test-3 ("WRAT-3"), and the Wechsler Adult Intelligence Scale - III ("WAIS-III). (2 RR 274, 277, 282, 285) She also conducted a clinical interview with Valdez. (2 RR 273) Altogether, Dr. Kessner spent nearly a full day with Valdez

in a private room in the Polunsky Unit. (2 RR 284-85, 289; 3 RR 312) She also met with him in Corpus Christi on June 8, 2004 to obtain some additional information. (2 RR 273)

24. The MMSE revealed that Valdez was alert and able to continue the battery of tests to be administered. (2 RR 274-77) The K-FAST measures one's practical reading and arithmetic skills. (2 RR 277-78) On the K-FAST, Valdez obtained a composite score of 69, which placed Valdez in the bottom second percentile and led Dr. Kessner to conclude that Valdez suffers from a significant deficit in adaptive functioning hi the area of functional academic skills. (2 RR 280-82) On the WRAT-3, Valdez obtained scores on reading, spelling, and arithmetic that placed him in the lowest one or two percentile and in the equivalent of the first or second grade. (2 RR 282-85) Those results are consistent with the results Valdez obtained in 1990 when Dr. J. Randall Price administered the WRAT-R to Valdez. (3 RR 9-10) Finally, on the WAIS-III, a very widely used and accepted individually administered test for measuring intellectual functioning, Valdez demonstrated a full scale IQ of 64 (based on a verbal IQ of 66 and a performance IQ of 69). (2 RR 287-88) These results were highly consistent with the results of the WISC administered by the Corpus Christi Public Schools in 1968 and the WAIS administered by Dr. Cohorn in 1974, both of which showed that Valdez had a full scale IQ of 63 (well below the threshold for a diagnosis of mental retardation). (Pet. Exhibits 1-3, 40A, 40B, 40C; 2 RR 300-04) Dr. Kessner testified that she found no indications that Valdez was malingering, that he lacked motivation, that he was not trying, or that the test scores were influenced by any language factor when he took the tests she administered. (2 RR 313, 318-20; 3 RR 25)

25. Based on the tests she administered as well as the results of the previous tests that she reviewed, Dr. Kessner opined that Valdez has significantly subaverage intellectual functioning with an IQ well below 70 on individually administered general intelligence tests. (2 RR 294, 320) In addition, based upon her clinical interview and review of the documents described above, Dr. Kessner opined that Valdez has significant limitations in several adaptive skill areas, including functional academics, social and interpersonal skills, and work. (3 RR 8-23) She also is of the opinion that Valdez's deficits in intellectual functioning and adaptive skills manifested themselves before the age of 18. (3 RR 23)

26. Dr. Kessner opined, based upon a reasonable degree of psychological and scientific certainty, that Valdez is mentally retarded. (2 RR 292; 3 RR 23-24) The Court finds Dr. Kessner to be highly qualified and her testimony to be highly credible, and it credits her opinion that Valdez is mentally retarded.

27. Dr. Richard Garnett is a psychologist from Fort Worth, Texas. (3 RR 100; Pet. Exhibit 39) He has specific training and practical experience in the area of mental retardation, and was recently elected to the Board of Directors of the American Association on Mental Retardation ("AAMR"). (3 RR 102-10) Dr. Garnett focused principally on the issue of whether Valdez has significant limitations in adaptive functioning, which generally refers to how effectively individuals cope with common life demands and how well they meet the standards of personal independence that are expected of someone in their particular age group, social cultural background, and community setting. (2 RR 119-20; 3 RR 101, 116-18, 319-20)

28. Dr. Garnett explained in detail the concept of adaptive functioning as well as the methodology used to

assess adaptive behavior for the purpose of diagnosing mental retardation. (3 RR 116-18, 125-40) In particular, Dr. Garnett explained that, in making a retrospective forensic assessment of the adaptive functioning of an adult individual who has been imprisoned for a number of years, it is neither necessary nor appropriate to employ standardized scales such as the Vineland Adaptive Behavior Scale or the AAMR Adaptive Behavior Scale. (3 RR 131-36) Among other problems, such scales are not normed for adult individuals in segregated living environments like prisons. (3 RR 131-32, 135) Nor is it necessary or appropriate in diagnosing mental retardation to measure the inmate's behavior in a controlled, segregated environment like a prison setting. (3 RR 130, 138-39, 211, 227) Instead, as Dr. Garnett testified, it is essential for a psychologist to use his or her clinical judgment, combined with a reliance on available documentation from the developmental and later periods, in assessing whether an adult inmate like Valdez has significant deficits in adaptive functioning. (3 RR 132-33, 136-38; see also 2 RR 126-27 [Dr. Mears]; Pet. Exhibit 42)

29. Based on his review of the documents discussed above and his three-hour clinical interview with Valdez on March 11, 2004, Dr. Garnett is of the opinion that Valdez has significant limitations in two or more adaptive skill areas, including functional academics, social skills, leisure, and work, and that these limitations manifested themselves by the time Valdez turned 18. (3 RR 140-42, 146-47)

30. The adaptive skill area of "functional academics" involves one's abilities and skills related to learning at school that also have direct application to one's life. (3 RR 147) Dr. Garnett's opinion that Valdez has significant limitations in functional academics is based upon the tests

administered by Dr. J. Randall Price and Dr. Kessner, his own clinical interview of Valdez, the testimony of family members, and historical records such as the Corpus Christi School District records, the Big Spring evaluation, Debra Mayer's probation report, and Valdez's prison records. (3 RR 148-63; see also 2 RR 146 [Dr. Mears])

31. The adaptive skill area of "work" involves one's ability to hold a job in the community in terms of specific job skills, appropriate social behavior, and related work skills such as budgeting time, completing tasks, getting along with co-workers, and allocating financial resources. (3 RR 164) Dr. Garnett's opinion that Valdez has significant limitations in the area of work is based upon his clinical interview, the testimony of family members, and historical records such as the Mayer probation report and Valdez's prison records describing his involvement in unskilled and menial work projects. (3 RR 165-69)

32. The adaptive skill area of "social skills" involves one's ability to initiate and maintain interpersonal relations with others, to regulate one's own behavior, to control impulses and avoid victimization, to take part in one's community life, and to follow rules and obey laws. (3 RR 169-70, 175) Dr. Garnett's opinion that Valdez has significant limitations in the area of social skills is based upon his clinical interview, the testimony of family members, historical records such as the Mayer probation report and the Big Spring evaluation, and the records of Valdez's criminal convictions, which reveal his history as a hapless thief rather than a violent or calculating criminal. (3 RR 170-84; see also 2 RR 149, 152 [Dr. Mears])

33. The adaptive skill area of "leisure" involves one's ability to develop a variety of leisure and recreational interests that are characteristic of a well-founded person. (3 RR 185) Dr. Garnett's opinion that Valdez has significant limitations in the area of leisure is based upon

his clinical interview, the testimony of family members, and his review of historical records such as the Mayer report and the Big Spring evaluation. (3 RR 186-88)

34. Finally, Dr. Garnett testified that Valdez's deficits in adaptive functioning are illustrated by a number of other factors, including: (1) the observations of those who knew and observed him during the developmental phase; (2) the impulsivity and lack of planning inherent in his conduct; (3) his propensity to be manipulated and led around by others rather than to show leadership; (4) his largely irrational and inappropriate response to external stimuli; (5) his occasional inability during the developmental period to respond rationally, coherently, and on point to oral or written questions; (6) his inability to hide facts or lie effectively in his own interests, including during his capital murder trial; (7) the fact that the commission of the capital offense did not require forethought, planning, or complex execution of purpose. (3 RR 189-95)

35. The fact that Valdez has shown an ability to groom himself, form relationships with women, drive a car, and earn modest amounts of money when not in prison does not exclude a diagnosis of mental retardation. (2 RR 67-69; 3 RR 123, 184-85) As Dr. Garnett testified, and as the A AMR confirms, individuals may have capabilities and strengths that are independent of their mental retardation, and individuals with mild mental retardation can usually live independently in the community. (3 RR 121-23; see also 2 RR 70 [Dr. Mears]) Further, the fact that Valdez has successfully adjusted to prison life is not inconsistent with a diagnosis of mental retardation. (3 RR 196) As Dr. Garnett testified, prison involves a rigid, organized, routine existence where rules are extremely clear and where no critical thought or independent decisions need be made. (Id.)

36. Dr. Garnett also agreed with Dr. Kessner that Valdez has significantly subaverage general intellectual functioning, and that these deficits, like his deficits in adaptive functioning, manifested themselves before the age of 18. (3 RR 114-15) Based upon a reasonable degree of psychological and scientific certainty, Dr. Garnett is of the opinion that Valdez is mentally retarded. (3 RR 196-97) The Court finds Dr. Garnett to be highly qualified and his testimony to be highly credible, and it credits his opinion that Valdez is mentally retarded.

37. Dr. J. Randall Price is a clinical and forensic psychologist and neuropsychologist from Fort Worth, Texas. (3 RR 272-73; Pet. Exhibit 41) On June 29, 1990, after Valdez had filed his first habeas corpus petition, Dr. Price examined Valdez at the Ellis I unit. (3 RR 278; Pet. Exhibits 26, 27) He subsequently testified at the state court evidentiary hearing in November 1990, at the federal court evidentiary hearing in June 1999, and at this evidentiary hearing in June 2004, in which he opined that Valdez is mentally retarded. (3 RR 276-77, 296) Dr. Price based his opinion upon his clinical interview of Valdez, the numerous documents he reviewed, the intelligence tests administered by the Corpus Christi Public Schools, Dr. Cohorn, and Dr. Kessner, his own administration of the Wide Range Achievement Test- Revised ("WRAT-R"), and his administration of the Halstead-Reitan Neuropsychological Test Battery ("Halstead-Reitan"). (3 RR 278-96; Pet. Exhibits 26, 27)

38. Dr. Price administered the WRAT-R to Valdez in June 1990 in order to assess his academic abilities and educational level. (3 RR 278, 280-81; Pet. Exhibits 26, 27) Valdez obtained a score of 63 on the reading test, a score of 54 on the spelling test, and a score of 56 on the arithmetic test. (Id.) Each of those scores is in the bottom 1 percentile, and place Valdez in the equivalent of third or

fourth grade. (Id.) According to Dr. Price, these tests show functional illiteracy and an educational level commensurate with the IQ results obtained from the WISC administered in 1968 and the WAIS administered in 1974. (Id.)

39. In addition to his clinical interview of Valdez and his administration of the WRAT-R, Dr. Price also administered the Halstead-Reitan to Valdez in June 1990. (3 RR 281; Pet. Exhibits 26, 27) Dr. Price testified that the Halstead-Reitan measures brain functioning and motor behavior, and that the results of one of the tests in the Halstead-Reitan battery — known as the category test — were particularly relevant to his determination whether Valdez is mentally retarded. (3 RR 283-85) Specifically, on the category test, Valdez's efforts were discontinued after multiple errors and an inability to come up with an effective strategy to complete even the simplest task. (3 RR 285; 4 RR 42; Pet. Exhibits 26, 27) Valdez had an impairment rating of 5 on the category test, placing him the severe range of dysfunction in higher order cognitive processes such as problem solving, judgment, abstract reasoning, mental flexibility and efficiency, and the ability to learn new non-verbal materials. (3 RR 284-86; 4 RR 42-43; Pet. Exhibits 26, 27) This test is very sensitive to brain dysfunction and has a high correlation to adaptive functioning (or the lack thereof). (Id.)

40. Based on his review of the 1968 Corpus Christi Public School tests, the 1974 Big Spring Hospital test, the tests administered by Dr. Kessner, and other documents, along with his own administration of the WRAT-R and the Halstead-Reitan tests, Dr. Price opined that Valdez has significantly subaverage general intellectual functioning evidenced by IQ scores on individually administered standardized tests of well below the threshold of 70. (3 RR 288- 89, 302-03, 311-14, 318; 4 RR 31) In addition, based

on his review of these and other materials, and his administration of the WRAT-R and Halstead-Reitan tests, Dr. Price opined that Valdez has significant limitations in adaptive functioning in the areas of conceptual skills (especially functional academics), social skills, and practical skills (especially in the area of work). (3 RR 319-40) Further, Dr. Price is of the opinion that the onset of all these deficiencies was by the time Valdez turned 18 years of age. (3 RR 289, 340-41)

41. Dr. Price opined, to a reasonable degree of psychological and scientific certainty, that Valdez was and is an individual with mental retardation. (3 RR 295-96, 342) Dr. Price testified that his conclusion was the same under (1) the American Psychiatric Association's definition of mental retardation found in the Revised Fourth Edition of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (2) the Ninth Edition of the American Association of Mental Retardation's MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, (3) the Tenth Edition of the American Association of Mental Retardation's MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, and (4) section 591.003(13) of the Texas Health and Safety Code. (3 RR 293-96, 324-25) The Court finds Dr. Price to be highly qualified and his testimony to be highly credible, and it credits his opinion that Valdez is mentally retarded.

42. Dr. Gary Mears is a psychologist from Tyler, Texas, and was retained by the State of Texas in this case. (2 RR 25, 182) Dr. Mears was initially called adversely by Valdez. (2 RR 25) Later, after hearing the evidence presented by counsel for Valdez, Dr. Mears — when he was recalled in the State's case-in-chief — changed his opinion and testified that based upon the evidence he had

reviewed and heard, he is now of the opinion that Valdez is indeed mentally retarded. (4 RR 165, 171-75) He changed his opinion after hearing the testimony and reviewing Dr. Price's Halstead-Reitan Neuropsychological Test Battery, with particular emphasis on the category test. (4 RR 165-75) According to Dr. Mears, Valdez's poor performance on the category test confirms that Valdez suffers from brain impairment to the pre-frontal lobe, and that such impairment has resulted in significant defects in adaptive functioning (evidenced by impulsivity, an inability to make long range plans, to think abstractly, and to appreciate the consequences of his actions, and diminished social judgment), and in significantly subaverage general intellectual functioning, all of which manifested itself before the age of 18. (4 RR 165-75) Dr. Mears ultimately concluded that Valdez meets the criteria for mild mental retardation. (4 RR 171, 173-75) Dr. Mears has testified on behalf of the State regarding whether an inmate is mentally retarded on other occasions, but this is the first occasion when Dr. Mears has testified that an inmate is mentally retarded. (2 RR 50) The Court credits Dr. Mears's revised opinion that Valdez is mentally retarded.

43. The consensus of expert testimony presented at the evidentiary hearing was that Valdez is mentally retarded. All four experts who expressed opinions on whether Valdez is mentally retarded (Dr. Kessner, Dr. Garnett, Dr. Price, and Dr. Mears) agreed that he is mentally retarded — including the only expert to express an opinion on whether Valdez is mentally retarded called by the State. This expert opinion testimony is consistent with the conclusion reached by the Corpus Christi Public Schools over 35 years ago that Valdez is in what was then called the educable category of mental retardation. This expert opinion testimony is also consistent with the staff

diagnosis at the Big Spring State Hospital some 30 years ago that Valdez is mentally retarded. Valdez's claim of mental retardation was vigorously contested by the State, but at the conclusion of the evidence even the State conceded that the evidence demonstrated that Valdez is mentally retarded.

44. Based on the evidence presented, and applying the definitions of mental retardation adopted by (1) the Revised Fourth Edition of the DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, (2) the Ninth Edition of the American Association of Mental Retardation's MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT; (3) the Tenth Edition of the American Association of Mental Retardation's MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, and (4) section 591.003(13) of the Texas Health and Safety Code, this Court finds from a preponderance of the evidence that Valdez is mentally retarded under each of these definitions. Indeed, the Court finds the evidence that Valdez is mentally retarded to be clear and convincing.

CONCLUSIONS OF LAW

45. The U.S. Supreme Court's ruling in Atkins v. Virginia, 536 U.S. 304, 153
L.Ed.2d 335 (2002), states a new rule of constitutional law that applies retroactively to all cases, including those on collateral review like Valdez's. See In re Johnson, 334 F.3d 403 (5th Cir. 2003); Ex pane Soffar, 2004 WL 245190, at *3 (Tex. Crim. App. 2004).

46. Although the Supreme Court in Atkins v. Virginia left to the States the task of determining how to decide whether a defendant is mentally retarded and thus is constitutionally exempt from execution, the Court quoted with approval the definitions of mental retardation

employed by the American Association of Mental Retardation and the American Psychiatric Association. According to the AAMR's MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 5 (9th ed. 1992), and the APA's DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS-IV at 41 (4th ed. 2000), mental retardation is characterized by:

- Significantly subaverage general intellectual functioning, as indicated by an IQ of approximately 70 or lower.
- Significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.
- The onset before the age of 18 years.

Atkins, 153 L.Ed.Zd at 342, n.3.

47. In Ex Pane Briseno, 135 S.W.3d 1, 8 (Tex. Crim. App. 2004), the Texas Court of Criminal Appeals adopted the definition of mental retardation set forth by the A AMR 1992, as well as the definition the Texas legislature set forth in Texas Health and Safety Code § 591.003(13). That section defines mental retardation as "significantly subaverage general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period."

48. In 2002, the AAMR reconceptualized its definition of mental retardation. (3 RR 320) In MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS at 23 (10th ed. 2002), the AAMR defined mental retardation as "a disability characterized by significant limitations both in intellectual functioning and in adaptive behavior as expressed in conceptual, social, and practical adaptive skills. This

disability originates before age 18." The ten adaptive skill areas defined by the AAMR in its Ninth Edition are subsets of the "conceptual, social, and practical" adaptive skill areas utilized in the Tenth Edition. Id. at 82.

49. The Court concludes, based on the documentary evidence, the testimony of family members, and the testimony of the expert psychologists in this case, that Valdez is mentally retarded under all of these definitions, including the definitions in the AAMR's Ninth Edition, the AAMR's Tenth Edition, the revised edition of the DSM-IV, and the Texas Health and Safety Code. In particular, Valdez proved, by a preponderance of the evidence (indeed, by clear and convincing evidence), that he has significantly subaverage general intellectual functioning as indicated by an IQ well below 70, that he has significant limitations in adaptive functioning, and that these deficits manifested themselves before the age of 18.

50. The "other evidentiary factors" identified in Briseno, 135 S.W.Sd at 8-9, further substantiate the Court's finding and conclusion that Valdez is mentally retarded. In particular, the evidence shows that:

- Those who knew Valdez best during the developmental stage - his family, his teachers in the Corpus Christi School District, probation officer Debra Mayer, and Dr. Cohorn, thought he was mentally retarded and acted in accordance with that determination.
- Valdez's conduct tended to be impulsive rather than planned.
- Valdez's conduct showed that he was led around by others instead of showing leadership.
- His conduct in response to external stimuli was not rational and appropriate.
- He often did not respond coherently, rationally, and on point to oral or written questions during the

developmental period.

- As evidenced by his testimony during his capital murder trial, he could not hide facts or lie effectively in his own interests.
- The commission of the capital offense did not require forethought, planning, and complex execution; rather, it was a tragic act of violence that was conceived and completed within a matter of seconds, immediately following a high-speed car chase and a struggle with a police officer.

The Court concludes that, based on these evidentiary factors as well, Valdez is mentally retarded.

51. Finally, the Court notes the observation in Atkins that mentally retarded offenders "by definition have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to control impulses, and to understand the reactions of others. . . . [T]hey often act on impulse rather than pursuant to a premeditated plan, and ... in group settings they are followers rather than leaders." Atkins, 153 L.Ed.2d at 348. Based on the extensive testimonial and documentary evidence, the Court finds and concludes that Atkin's description of mentally retarded offenders applies fully to Valdez, and that Valdez is mentally retarded under this description as well.

RECOMMENDED RELIEF

For all of the reasons stated above, the Court finds and concludes that Valdez is mentally retarded. The Court therefore recommends that, in accordance with Atkins and Briseno, the Texas Court of Criminal Appeals grant Valdez's Second Petition for Writ of Habeas Corpus, vacate his sentence of death, and reform his sentence to life imprisonment in the Texas Department of Criminal Justice Correctional Institutions Division. See Ex Pane Madden, 2004 WL 1462228, at *4 (Tex. Crim. App.

2004).

August 10, 2004

/s/
Sandra Watts, Presiding Judge
117th Judicial District Court

APPENDIX B

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

AP-75,039
EX PARTE ALBERTO VALDEZ, Applicant

ON APPLICATION FOR A WRIT OF HABEAS
CORPUS FROM NUECES COUNTY

Per curiam.

OPINION

In his subsequent application for a writ of habeas corpus, applicant claimed that he is mentally retarded. We determined that applicant had met the requirements of Code of Criminal Procedure Article 11.071, § 5, and we remanded to the trial court for findings of fact and conclusions of law. The trial court held an evidentiary hearing and found that applicant is mentally retarded. The record supports the trial court's findings. *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004). Accordingly, we grant relief. We reform applicant's sentence to life imprisonment in the Texas Department of Criminal Justice Correctional Institutions Division.

Delivered November 10, 2004
Publish

APPENDICES C & D
(Consolidated)

THE COURT OF CRIMINAL APPEALS OF TEXAS

JANUARY 12, 2005

THE FOLLOWING ORDERS ARE ENTERED AND OPINIONS HANDED DOWN:

STATE'S MOTION FOR REHEARING DENIED:

PD-0424-03 GUEVARA, JAMES GEORGE FROM BEXAR COUNTY - 04-00-00340-CR

(JUDGE HERVEY NOT PARTICIPATING)

PD-1397-03 STATE OF TEXAS VS. KURTZ, MATTHEW WAYNE V. FROM COLLIN COUNTY - 05-02-00421-CR

AP-75,039 VALDEZ, EX PARTE ALBERTO FROM NUECES COUNTY

(STATE'S MOTION TO STAY ISSUANCE OF MANDATE IS GRANTED)

APPENDIX E
(excerpt)
CAUSE NO. 87-CR-1459-B
Writ No. 31,184-01

EX PARTE ALBERTO VALDEZ

IN THE DISTRICT COURT
117TH DISTRICT
NUECES COUNTY, TEXAS

Returnable to
THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

STATE'S SUPPLEMENTAL RESPONSE TO SECOND POST-CONVICTION 11.071 APPLICATION FOR WRIT OF HABEAS CORPUS

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ORAL ARGUMENT IS REQUESTED

*Filestamped July 27, 2004, Nueces Co. Dist. Clerk.

2. This Court should conclude that *Atkins* does not apply retroactively to a death sentence imposed long before there was any "general consensus" against executing the mentally retarded.

The *Atkins* opinion itself says nothing about retroactive application to a fifteen-year-old sentence handed down at a time when no national consensus had yet developed against condemning the mentally retarded to death.

In *Ex parte Briseno*, 135 S.W.3d 1, 9 (Tex. Crim. App. 2004), this Court expressed some doubt as to whether *Atkins* applies retroactively in the present situation. *Id.* at 9 ("Even if the holding of *Atkins* applied retroactively and may allow a person sentenced to death under Texas law to have a claim of mental retardation first addressed under article 11.071, ...").

A. The Societal Consensus Doctrine.

In *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 1774 (1987), the Supreme Court recognized that "a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense." 107 S.Ct. at 1774; *see also Payne v. Tennessee*, 111 S.Ct. 2597, 2608 (1991). In 1989, the Supreme Court concluded that no societal consensus existed at that time against executing the mentally retarded. *Penry v. Lynaugh*, 109 S.Ct. 2934, 2955 (1989). Thirteen years later, the Court in *Atkins* found that such a consensus had developed, based largely on an examination of legislation from the various states prohibiting the execution of the mentally retarded. *Atkins*, 122 S.Ct. 2248-49

Interestingly, the same concept of a societal

consensus was earlier applied by the Supreme Court in a narrower sense, as a justification for allowing the states to impose a death sentence as a necessary punishment, based on "respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction." *Gregg v. Georgia*, 96 S.Ct. 2909, 2931 (1976).

Accordingly, it appears that this concept of a societal "consensus" may cut both ways regarding Eighth Amendment restrictions: statewide consensus as evidenced by the legislature's own judgment concerning the death penalty must be respected and not barred by the Eighth Amendment; at least until enough states have enacted contrary legislation to evidence a broader national consensus going against that individual state judgment, in which case the Eighth Amendment does bar the death penalty. Exactly when national consensus trumps an individual state's consensus is hard to say, but it seems at least worth considering that, until the pendulum swings in favor of an overriding national consensus, respect for the state's own consensus requires that its convictions and sentences should be allowed to stand.

B. Retroactive Application.

A decision of the Supreme Court resulting in a new rule applies only in limited circumstances to convictions that are already final. One such circumstance is when the new rule prohibits a certain category of punishment for a class of defendants because of their status or offense. *See Beard v. Banks*, 124 S.Ct. 2504, 2513 (2004); *Schriro v. Summerlin*, 124 S.Ct. 2519, 2522 (2004); *Penry v. Lynaugh*, 109 S.Ct. 2934, 2952-53 (1989); *Teague v. Lane*, 489 U.S. 288, 311, 109 S.Ct. 1060 (1989) (plurality opinion).

However, the State could find no case where the Supreme Court has definitively applied that principle to a substantive right newly generated based on the "societal consensus" doctrine. Of course, where a right is based on pre-existing principles that have been re-examined, and the right newly applied to a particular situation or class, it makes sense to apply those pre-existing principles even to cases that pre-date their formal recognition as binding in some new way. However, when the right is based on a newly formed "societal consensus," it should not apply to sentences handed down prior to such a consensus, when the right simply did not exist at all.

Even the Supreme Court's opinion in *Penry*, where it suggested that a ruling protecting the mentally retarded from execution would be applied retroactively, that suggestion was merely dicta in view of the Court's conclusion that there was then no general consensus against executing the mentally retarded. 109 S.Ct. at 2953 & 2955.

In the present case, there was no societal consensus against executing a mentally retarded offender at the time Valdez was sentenced to death. *See Penry*, 109 S.Ct. at 2955. Respect for the law in effect at that time and society's own sense of justice as then understood requires that the jury's sentence be respected and not barred by a later change in public sentiment. *Atkins* should not be applied retroactively.

3. Even if, under *Atkins*, the Eighth Amendment bars Valdez's actual execution, it does not require that the underlying death sentence itself be vacated or that the other consequences of that death sentence be removed, as long as the execution itself is indefinitely or permanently stayed.

A. Atkins bar execution, but does not condemn the underlying sentence.

At least in the context of an inmate already sentenced to death, *Atkins* does not condemn the death sentence itself as having been improperly rendered in any manner, but merely prohibits the execution of an inmate who can prove his claim of mental retardation. It is thus a restriction upon the *execution* of the sentence and not the original *imposition* of sentence.

The *Atkins* court tracked the language of its earlier opinion in *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595 (1986), in holding that the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins*, 122 S.Ct. at 2252 (quoting *Ford*, 477 U.S. at 405). The *Ford* court had stated that "the Eighth Amendment prohibits a State from *carrying out* a sentence of death upon a prisoner who is insane," *Ford*, 477 U.S. at 409-10, 106 S.Ct. at 2602 (emphasis added), and in another portion of the opinion that, "[t]he Eighth Amendment prohibits the State from *inflicting* the penalty of death upon a prisoner who is insane. Petitioner's allegation of insanity in his habeas corpus petition, if proved, therefore, would *bar* his execution." *Ford*, 477 U.S. at 410, 106 S.Ct. at 2602 (emphasis added).

Also tracking *Ford*, the *Atkins* court left to the States "'the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" *Atkins*, 122 S.Ct. at 2250 (quoting *Ford*, 477 U.S. at 416-17, 106 S.Ct. at 2605).

In implementing the requirements of *Ford* concerning a condemned inmate found incompetent to be executed, the statutory remedy in Texas is not to reform the sentence to life in prison, but merely to stay the execution. TEX.

CODE CRIM. PROC. ANN. art. 46.05(k) (Vernon Supp. 2003).

This Court has recognized recently that, similar to incompetency to be executed, "mental retardation is not necessarily a lifelong disorder." *Ex parte Briseno*, 135 S.W.3d 1, 6 (Tex. Crim. App. 2004) (quoting AMERICAN PSYCHIATRIC ASSOCIATION DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS p. 44 (Text Revision, 4th ed. 2000) (DSM-IV)). This Court further recognized the possibility, as expressed in the DSM-IV, that a mentally retarded individual might improve to the point that he would no longer be classified as mentally retarded. *Briseno*, 135 S.W.3d at 6 n.18; *See also* Applicant's Exhibit # 30, American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, p. 44 (4th ed.) ("Mental Retardation is not necessarily a lifelong disorder. Individuals who had Mild Mental Retardation earlier in their lives manifested by failure in academic learning tasks may, with appropriate training and opportunities, develop good adaptive skills in other domains and may no longer have the level of impairment required for a diagnosis of mental retardation.").

That being the case—*i.e.*, that mild mental retardation may be a transitory condition like incompetency—it seems only appropriate that it should not be a cause for vacating the underlying death sentence, but only a reason to stay the execution while the condition persists. In many cases, of course, as with incompetency, the condition may in fact be permanent and the stay of execution will likewise, effectively, be permanent.

B. There is no statutory authority to reform a death sentence that was properly imposed.

The only provision in the Code of Criminal Procedure for the reformation of a death sentence to a life sentence requires either a finding of insufficient evidence to support the death sentence, or both a finding of error in the punishment stage and a request for such relief from the prosecuting attorney. *See* TEX. CODE CRIM. PROC. ANN. art. 44. 251 (Vernon Supp. 2003); *Garcia v. State*, 57 S.W.3d 436, 441 (Tex. Crim. App. 2001).

This Court has recently recognized that a claim of mental retardation has nothing to do with proof of the underlying offense of capital murder or the elements necessary to assess a death sentence, but that it operates as an "exemption" not unlike, among other things, incompetency to be executed.

Ex parte Briseno, 135 S.W.3d 1, 10, 12 (Tex. Crim. App. 2004) (lack of mental retardation is not an implied element of the crime of capital murder).

C. Aside from execution, a capital death sentence includes other consequences that a capital life sentence does not.

One adjudged guilty of a capital felony may be sentenced to either life imprisonment or a "death" sentence. TEX. PENAL CODE ANN. § 12.31(a) (Vernon 2003).

Of course, the most obvious consequence of a death sentence is that it allows the State to cause the defendant's death by lethal injection. TEX. CODE CRIM. PROC. ANN. art. 43.14 (Vernon Supp. 2003).

However, a death sentence also effectively incorporates the punishment of life imprisonment without the possibility of parole, as follows: Upon conviction, a person under death sentence is immediately transferred to the Texas Department of Criminal Justice –Institutional Division. TEX. CODE CRIM. PROC. ANN. art. 42.09, §§ 1

& 3 (Vernon Supp. 2003). Absent judicial action or executive clemency, he remains imprisoned there until either natural death or lethal injection, since "[a]n inmate under sentence of death is not eligible for release on parole." TEX. GOV'T CODE ANN. § 508.145(a) (Vernon Supp. 2004).[1]

This post-judgment imprisonment is unlike pre-trial confinement to secure the defendant's presence at trial and is carried out in the Texas Department of Corrections rather than the county jail. Thus, it must be considered an integral part of the defendant's "punishment" in connection with his death sentence.

This aspect of the punishment imposed under a death sentence, moreover, distinguishes it from a life sentence for capital murder, which presently does allow for the possibility of parole after forty calendar years, *See* TEX. GOV'T CODE ANN. § 508.145(b) (Vernon Supp. 2004), and which, considering that Valdez committed his capital murder in 1987, would allow him to be eligible for parole in fifteen calendar years, *which means immediately. See* TEX. CODE CRIM. PROC. art. 42.18, § 8(b), *Acts of the 70th Legislature, Regular Session*, 1987, Ch. 384, § 5 & Ch. 11.01, § 7.

In addition to these tangible consequences, a "death sentence" also includes the stigma of being singled out by a jury as deserving of the highest form of condemnation known to our criminal law. Although death by lethal injection may never be carried out because of the defendant's disability, this does not detract from the jury's

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[1] The law in effect at the time Valdez committed capital murder likewise denied parole to an inmate under a death sentence. *See* TEX. CODE CRIM. PROC. art. 42.18, § 8(b), *Acts of the 70th Legislature, Regular Session*, 1987, Ch. 384, § 5 & Ch. 11.01, § 7.

findings that he deserves that stigma, which the defendant should be required to bear in the form of an unexecutable "death sentence."

D. The finding of future dangerousness remains valid.

Although death by lethal injection may never be carried out because of the defendant's disability, this does not detract from the jury's finding that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(b)(1) (Vernon Supp. 2003).[2] In other words, nothing in *Atkins* suggests that we should erase the jury's finding that Mr. Valdez is "a continuing threat to society." If society may not protect itself from that threat by executing Valdez, it should at least be able to protect itself by means of the other aspect of a death sentence—life without parole—rather than leaving the victim's family and other potential victims vulnerable to the possibility that Valdez may one day walk the streets again.

E. Conclusion.

Nothing prevents this Court from allowing the "death sentence" to remain, to the extent that the punishment of life imprisonment on death row without the possibility of parole remains legitimate, but to either indefinitely or permanently stay the scheduling of an execution date[3] and

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[2] This jury question has remained in Article 37.071 since its inception in 1973. *Acts of the 63rd Legislature,* 1973, Ch. 426, art. 3, § 1.

[3] TEX. CODE CRIM. PROC. ANN. art. 43.141 (Vernon Supp. 2003).

the warrant of execution,[4] as the means chosen by Texas to comply with *Atkins*.

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[4] TEX. CODE CRIM. PROC. ANN. art. 43.15 (Vernon Supp. 2003).